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IN THE

SUPREME COURT OF THE UNITED STATES

1982 TERM

NO. 82-521

EVERETT JONES, Superintendent,
Great Meadow Correctional Facility,
and ROBERT ABRAMS, Attorney General
of the State of New York,

Petitioners,

-against-

PEDRO ARROYO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the decision of the Court of Appeals that respondent's due process rights were violated by the State trial court's supplemental instruction, given in response to the jury's third request for clarification of the law of intent, that "people are presumed to intend the natural, probable and logical consequence of their acts," should be reviewed by this Court.

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OPINIONS BELOW

The opinions of the district and circuit courts are set forth in the appendix to the Petition. (The Circuit Court opinion, not officially reported when the Petition was filed, appears at 685 F.2d 35 [2d Cir. 1982]; citation to this opinion will be both to petitioner's appendix and the official report.) The opinion of the State court trial judge on the motion to vacate respondent's conviction is set forth in Appendix C, infra.

STATEMENT OF THE CASE

I. The Trial

A. The Prosecution Case

On April 13, 1972, several New York City police officers received a radio run of a "burglary in progress" at a music store on Third Avenue between 117th and 118th Streets in the Borough of Manhattan (283-86, 310, 329-30).[1]

Responding to that location, the officers saw three men walking out of a store. One man, respondent Pedro Arroyo, was stopped and asked to return to the store (GLICKSTEIN: 286-89). Mr. Arroyo initially complied with this request. Suddenly, however, as more officers appeared on the scene, he started running, and, according to two of them, pointed a gun back across his shoulder and fired once or twice at one of the officers from a distance of from five to seven feet (GLICKSTEIN: 290-91, 295-99; BERNARD: 427).

After further shots were exchanged, respondent Arroyo shouted, "I'm hit. I give up" (GLICKSTEIN: 300-

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[1] Parenthetical references are to pages of the trial minutes.

05). Mr. Arroyo was then arrested and taken to a hospital where he was treated for gunshot wounds of the chest, back, thigh, foot, wrist, and finger (496).

Police Officer RAYMOND BERNARD, who testified that he had been hit in the chest at the outset of the shooting by something that "felt like a rock" (427), later discovered that his gun handle was broken and that he had "a line, a scar like... on [the] hand from the tip of [the] finger to the heel of [the] hand." He also found a rip in the right chest area of his jacket (433-34). Officer Bernard was given some ointment and a tetanus inoculation for the scratch on his hand (444-45, 495).

B. The Defense Case

PEDRO ARROYO testified that his memory surrounding the shooting was sketchy due to the multiple injuries he sustained. He did recall, however, having been accosted by a gun-wielding stranger, who had a second weapon at his waistline (609). Mr. Arroyo, previously unarmed, remembered seizing this weapon and starting to run; he did not remember whether he had fired it (611-13, 622-23).

ANNA COLAZO and SUE LYDIA PRATTS testified that respondent did not have a gun and that all the shooting was done by the police (COLAZO: 520-23, 525-26; PRATTS: 546-48, 597-98, 603, 606).[2]

C. Charge, Deliberations, Verdict, and Sentence

The trial judge charged the jury on attempted murder and four lesser-included counts. She told the jury that an essential element of the top count was that "[Pedro Arroyo be shown to have acted] with intent to cause the death of Raymond Bernard" (759). Defining that intent,

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2 Ms. Colazo had, however, given a pre-trial statement to a defense investigator indicating that Mr. Arroyo had drawn a gun as he ran past her building on 117th Street (533).

she said:

> ... under our law, a person acts intentionally with respect to attempting to cause the death of another person when the alleged perpetrator's conscious objective is to cause such death....of course, we all recognize that an intention is a subjective matter and it depends on the operation of an individual's mind nonetheless it is possible to make a finding of intention based on objective actions of the alleged perpetrator; in fact, this is the only method that we can use in determining intention since we cannot get into the mind of the alleged perpetrator. Therefore, in your deliberation, you may use the defendant's objective action as a determining factor in deciding whether or not he acted intentionally.
>
> You may also refer to all the other evidence which may indicate intent or not indicate intent (760-61).

During its deliberations, the jury returned to the courtroom several times with questions. Once, it requested the testimony of Officer Bernard. Thereafter, it asked to rehear "the law and the interpretation of the [attempted murder] charge" (800). After further deliberation, it returned to the courtroom to ask, "[d]oes shooting at a police officer necessarily constitute attempted murder" (803).

The last communication from the jury was sent in six and one-half hours after it received the case.[3] It stated:

> We have reached agreements on four charges and divided on the fifth one, to assist us with the latter, we would seek further classification [sic] of the words "conscious intent" (810).

The State concedes that this unresolved charge was the top count of attempted murder.

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[3] See Arroyo v. Jones, 685 F.2d 35, 37 (2d Cir. 1982); petitioner's appendix at 5a.

In response to the prosecutor's suggestion (to which defense counsel had "no opposition" [809]), the judge delivered a supplemental instruction on intent which charged the jury for the first time -- in the instruction's final sentence -- that:

> "By agreement, I can tell you that people are presumed to intend the natural, probable and logical consequence of their acts (810). 4/

The verdict convicting respondent on all counts was announced twenty-five minutes later.[5]

II. State Post-Conviction Proceedings

In 1977, on direct appeal from the judgment of conviction and its mandatory minimum sentence of fifteen years to life, Mr. Arroyo relied on decisions from the Second Circuit[6] in arguing that the supplemental charge nullified the prosecution's obligation to prove intent and shifted the burden of proof on that element, thereby denying him due process of law. New York's appellate courts rebuffed this argument.

In 1980, respondent filed a motion to vacate his conviction. This motion was based on the intervening decision of Sandstrom v. Montana, 442 U.S. 510 (1979), which held that a charge that "the law presumes that a person intends the ordinary consequences of his voluntary acts" violated due process because a reasonable juror might interpret such a charge as "constitut[ing] either a burden-shifting presumption..., or a conclusive pre-

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4 Other language in the supplemental charge tracked the principal charge (compare 810 with 760-61).

5 See Arroyo v. Jones, 685 F.2d 35, 38 (2d Cir. 1982); petitioner's appendix at 6a.

6 Both parties to the appeal agreed that the supplemental charge represented a correct statement of New York law. Defense Brief in the Appellate Division, First Department, at 31; Prosecution Brief, at 43.

sumption." Id., at 524.

In a decision denying the motion on the merits (see Appendix C, infra), the original trial judge explicitly discounted trial counsel's failure to object to the supplemental charge.[7] After leave for a further appeal was denied, Mr. Arroyo turned to the federal courts.

III. Federal Proceedings

Respondent Arroyo's petition for a writ of habeas corpus was granted in the Southern District of New York on February 11, 1982. Upon the State's appeal, the Court of Appeals for the Second Circuit unanimously affirmed the reasoning of the District Court.

In preliminarily observing that all the Second Circuit's previous Sandstrom cases had involved presumption language appearing in the trial court's principal charge, the Court of Appeals distinguished Mr. Arroyo's case from every predecessor in the Circuit in that it, alone, involved language in a supplemental charge (petitioner's 8a; Arroyo v. Jones, supra, 685 F.2d at 38). In addition, however, and on the question of the charge-language itself, the Circuit Court noted that the State did not seriously contend that the portion of the challenged supplemental instruction was different from the type of instruction found invalid in Sandstrom, (petitioner's 8a; Arroyo v. Jones, supra, 685 F.2d at 38-

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7 "... no exception is necessary to preserve for appellate review a deprivation of a fundamental constitutional right. . . . While in the instant case, the defendant moves under [New York Criminal Procedure Law] §440.10(h) to vacate his 1973 conviction on the ground of deprivation of a fundamental constitutional right, although enunciated by the Supreme Court six years after his conviction, he may not be barred from the making of such a motion because he failed to make objection and affirmatively declared he had no opposition to the questioned instruction." See appendix, infra, at 10c.

39). Then, focusing on the distinctive factual aspects of the Arroyo jury's deliberations, the Circuit Court turned to the State's main contention that this instruction, read in light of the charge as a whole, could not have deprived respondent of the presumption of innocence:

> ...it is all very well as a general matter for the State to urge us to evaluate the effect of presumption language in light of the charge as a whole. But when the jurors have so little comprehended the unobjectionable initial charge that they have found it necessary to ask three times for clarification, it would be decidedly dense of us to assume that the unobjectionable initial charge, as to which enlightenment was requested, itself enlightened the jury as to the real meaning of the improper enlightenment (petitioner's appendix at 11a-12a; Arroyo v. Jones, supra, 685 F.2d at 40).

The Circuit Court opinion was no less pointed in its discussion of the State's related claim that the supplemental instruction was harmless:

> On the record before us there is every reason to believe that the court's presumption language made a special impression on jurors. It was the last sentence they heard before returning for their final minutes of deliberation. It was a brief and pointed statement. And, most importantly, it gave them a way to decide the issue that had caused them, first, to ask for an interpretation of the original instructions on attempted murder, second, to ask if a shot at a police officer necessarily evinced an attempt to murder, and third, to ask for "further cla[r]ification of the words 'conscious intent'." In light of this repeated questioning over the first six and one-half hours of deliberations, and in light of the jury's decision on the attempt count less than one-half hour after having heard the improper charge, it seems highly likely that the supplemental charge was in the forefront in the jurors' minds (petitioner's 10a-11a; Arroyo v. Jones, supra, 685 F.2d at 39-40).

Finally, the Circuit Court also rejected the argument put forward by the State that Mr. Arroyo's trial had not significantly raised the issue of intent:

> ...the issue as to intent to murder was highlighted by Arroyo's testimony that he had merely tried to protect himself by knocking Bernard aside and fleeing, and that he did not remember firing a gun. Thus the trial testimony raised a question as to intent, and the jury's inquiries during its deliberations reveal that it had substantial uncertainty as to whether the State had proven intent to murder beyond a reasonable doubt (petitioner's appendix at 12a; Arroyo v. Jones, supra, 685 F.2d at 40).

REASONS FOR DENYING THE WRIT

In Sandstrom v. Montana, 442 U.S. 510 (1979, this Court unanimously held that a charge that "the law presumes that a person intends the ordinary consequences of his voluntary acts" violates due process. Any reasonable juror, the Court pointed out, could easily interpret such language as "constitut[ing] either a burden-shifting presumption..., or a conclusive presumption" (id., at 524) and either of these eventualities, in turn, was constitutionally impermissible because both relieved the prosecution of the burden of proof enunciated in In re Winship (397 U.S. 358 [1970]) on the critical question of the accused's intent. In respondent Arroyo's state trial, the jury was charged that "people are presumed to intend the natural, probable and logical consequence of their acts." The State largely concedes that this presumption language is constitutionally indistinguishable from similar phrasing in Sandstrom. Because the sequence of jury deliberations below confirms the devastating impact upon the jurors of this improper charge language, the lower federal courts were clearly

correct in vacating respondent's conviction. For the same reason, this Court should deny the State's petition for certiorari.

As found by the Second Circuit, examination of the trial record here demonstrates the substantial likelihood that the jury's verdict was a direct product of the court's unconstitutional presumption charge. Over a period of six and one-half hours of deliberations, Pedro Arroyo's jury sent in several notes which showed that the jury was not only focused on, but, indeed, had persistent doubts about, the sufficiency of the evidence of Mr. Arroyo's intent to murder Officer Bernard. Then, when a final note asked for further clarification of the element of intent in relation to the attempted murder count, the jury was given the charge language set forth above. A guilty verdict followed twenty-five minutes later. On these facts, it would be decidedly dense, to borrow the Circuit Court's alliteration, to try to rule out all possibility that te jury relied on the improper instruction in reaching its verdict: it must not be forgotten, after all, that it was the mere potentiality of prejudice attendant upon resort to a "natural and probable consequences" charge with which the Sandstrom Court was concerned.

Consistent with so broad a formulation, the State's petition for a writ of certiorari abandons the notion, advanced in all the courts below, that the supplemental charge language in respondent's trial was harmless error. While the State thus implicitly concedes the prejudice caused by that language, however, its petition seizes on the lack of contemporaneous objection at the trial to argue that the lower federal courts were wrong in granting habeas corpus relief. But, as the Circuit Court's

opinion observed,

> [i]n light of the state court's rejection of the State's procedural argument and its decision on the merits of Arroyo's due process claim, Arroyo's failure to object at trial does not bar federal review. Engle v. Isaac, ___ U.S. ___, 102 S. Ct. 1558, 1575 n.44 71 L.Ed.2d 783 (1982); Washington v. Harris, 650 F.2d 447, 452 (2d Cir. 1981) [petitioner's 7a; Arroyo v. Jones, 685 F.2d, supra, at 38 n.3].

Indeed, the New York court's response to the post-judgment motion indicated that if the supplemental instruction were held to be federal constitutional error New York would have no reluctance to grant Mr. Arroyo a new and fair trial.

Despite the State's recognition that it is, then, too late in the day to contend that trial counsel's "no opposition" declaration constituted a procedural bar to federal review, the State nevertheless maintains that this phrase -- which it variously terms an "express consent" and an "express approv[al]" of the proposed language[8] -- should be fatal, on the merits, to the due process attack which both lower courts have favored. Support for this view is said to come from dictum in Henderson v. Kibbe (443 U.S. 145, 154 [1977]) to the effect that "[i]t is the rare case in which an improper

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[8] More accurately described as an unenthusiastic endorsement, counsel's response to the prosecutor's suggestion reflected that prevailing New York law both gave him no reason to interpose an objection to "a natural and probable consequences" charge nor, had he done so, any indication that it would have been availing. See petitioner's 6a n.2; Arroyo v. Jones, supra, 685 F.2d at 38 n.2.

In this regard, it is certainly not amiss to note of the instant intent charge that, in addition to its treatment at trial, where an assistant district attorney sponsored it, defense counsel declined to object to it, and the trial judge employed it, both parties on appeal conceded it to be a correct statement of New York law. See n.6 supra.

instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." However, Kibbe completely fails to support the State's position because, as the Chief Justice's concurring opinion pointed out (433 U.S. at 158 n.*), New York there determined -- in stark contrast to the present case -- to invoke its procedural rules to bar review of the defendant's claim. And, furthermore, assuming arguendo the applicability of the State's interpretation of the "rare case" exception, the present case assuredly comes within that exception.

That this is so is indicated by the concurrence in Ramirez v. Jones, 683 F.2d 712, 717-18 (2d Cir. 1982) cert. pending sub nom, Jones v. Ramirez, No. 82-584, a Sandstrom case cited by the State in support of its reading of the Kibbe dictum. While the Ramirez concurrer generally argued for the applicability of harmless error doctrine to cases, like respondent's, where the unobjected-to error in the state court is advanced as the basis for a claim to federal habeas corpus relief, he refused to find the error in that case to be harmless:

> [since] the faulty [Sandstrom] language bore directly on intent -- the central issue in the case -- [the] failure to object does not alter the conclusion that [the habeas applicant] is entitled to a new trial (id., at 718). 9/

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9 That some Sandstrom language may well be held harmless on the facts of a particular case -- as a matter entirely distinct from the issue of whether or not there was an objection at trial -- is to be expected. (In this connection, we take note of the Court's having granted certiorari in Connecticut v. Johnson, 50 U.S.L.Wk. 4368 (1982), a case where the unconstitutional impact of a single improper general instruction in the principal charge was held not cured despite the presence of other proper general instructions in combination with other specific proper instructions on the elements of the crimes allegedly affected by the improper instructions.) However, as the Ramirez concurrence reflects, it is no less equally to be expected that other Sandstrom language will not be held harmless.

In view of the fact that the same situation obtained at Arroyo's trial, it is evident that Ramirez v. Jones offers no comfort to the State in this proceeding.[10]

This Court once highlighted the prominence of a supplemental charge with these words: ". . . special care was indicated in replying to a written request for further light on a vital issue. . . . Particularly in a criminal trial, the judge's last word is apt to be the decisive word." Bollenbach v. United States, 326 U.S. 607, 612 (1946). These words take on an extraordinary significance in the context of respondent's trial. Put plainly, there is simply no way to minimize, much less totally preclude (as Sandstrom requires), the potential for prejudice that the constitutionally erroneous natural and probable consequences charge given below could create for an accused whose jury has been unable for hours, and despite repeated re-instruction, to resolve the critical element of intent.

The State bills its case for further review in this Court as resting on a "narrow but significant" issue of law. That description is, at best, half right. Yet, and we now assume the propriety of using the former adjective in connection with the State's argument, the unavoidable conclusion remains that the Court of Appeals for the Second Circuit decided correctly and fairly that respondent

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10 Turoso v. Cleveland Municipal Court, 674 F.2d 486 (6th Cir. 1982), the other case relied on by the State is equally unavailing for Turoso dealt with the omission of an instruction, and not, as here, with the inclusion of an instruction specifically found to be burden-shifting.

was entitled to habeas corpus relief.

CONCLUSION

FOR THE ABOVE REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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JOHN D.B. LEWIS
Attorneys for Respondent

October 27, 1982

APPENDIX C

Decision of the Supreme Court, New York County, denying respondent's motion to set aside his conviction.

SUPREME COURT OF THE STATE OF NEW YORK
TRIAL TERM PART 30
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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

Index No. 2447/72

PEDRO ARROYO,

Defendant.

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SCHWARTZ, J.:

This is a motion by defendant to vacate a judgment entered on April 12, 1973, after a jury verdict convicting defendant of attempted murder of a police officer (P.L. 110.00 and former P.L. Sections 125.25 and 125.30); attempted first degree assault (P.L. Sections 110, 120.10); two counts of second degree assault (P.L. Sec. 120.05) and possession of a weapon as a felony. The mandatory sentence imposed on the attempted murder conviction was a minimum of 15 years and a maximum of life with concurrent indeterminate terms on the other convictions.

On April 14, 1977, the Appellate Division modified by dismissing the lesser counts and unanimously affirmed the attempted murder conviction.

On May 12, 1977 leave to appeal to the Court of Appeals was denied.

This motion was argued at length. Leave was granted to defendant's counsel to submit a reply to the People's supplementary memorandum of law. Material was submitted in February and March of 1980.

This motion to vacate a judgment of 1973 is based on the sole ground of a subsequent decision of the United States Supreme Court on June 18, 1979 in Sandstrom v. Montana, ____U. S. ____, 61 L. E.D.2d 39, 99 S. Ct. 2450 (1979). The Supreme Court there held to be violative of Fourteenth Amendment due process the jury instruction, given over defendant's objection as follows: "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." (emphasis added) The Court in Sandstrom found the phrase objectionable on two grounds. One was that the jury may have interpreted the instruction as shifting the burden of proof to the defendant. The second ground was that the jury may have regarded the presumption as conclusive, relieving the State of its burden of proof.

In the case at bar, in its initial charge to the jury prior to commencement of its deliberations, the court omitted any mention of presumption language. Subsequently, the jury submitted a question and the court gave a supplemntary charge in language proposed by the prosecution, to which the defendant's attorney made no objection and responded "I have no opposition to it." The court thereupon, together with additional language defining intent, charged: "By agreement, I can tell you that people are presumed to intend the natural, probable and logical consequences of their acts." Such charge has been conceded by defendant to have been a correct statement of New York law [1].

The question presented by defendant's motion is: did the language of such supplementary charge, violate the Fourteenth Amendment's requirement that the State prove every

element of a criminal offense beyond a reasonable doubt?

On June 18, 1979, six years after the conviction of the defendant Arroyo of attempted murder of a police officer, the Supreme Court decided Sandstrom v. Montana, supra. In that case at a jury trial in a Montana state court on a charge of deliberate homicide, the defendant admitted killing the victim but argued that he did not do so purposely or knowingly and was therefore not guilty of deliberate homicide but of a lesser crime. The trial judge, over the objection of defendant's counsel who argued that such instruction had the effect of shifting the burden of proof on the issue of purpose or knowledge to the defense, instructed the jury that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." In Sandstrom, the Supreme Court held that such jury instruction was unconstitutional as violating the Fourteenth Amendment due process requirement that the state prove every element of a criminal offense beyond a reasonable doubt, since the jury might have interpreted the presumption in the instruction as a conclusive presumption which would conflict with the overriding presumption of innocence. Sandstrom held that where intent is an element of the crime charged and where the jury is not told they have a choice, or that they might infer that conclusion, and if the instruction is considered to be a mandatory presumption rather than a permissive inference, and where the jury is not told that the presumption can be rebutted by the defendant's simple presentation of some evidence, nor even that it can be rebutted at all, the burden of persuasion on the

element of intent is effectively shifted.

In Sandstrom, the Supreme Court declined to reach the issues of whether a jury's reliance upon an unconstitutional instruction constituted harmless error and whether an unconstitutional jury instruction on an element of crime can never constitute harmless error where the state's highest court, which affirmed the conviction, had considered none of these issues. It held that the state court will be free to consider such issues on remand from the Supreme Court if it so desires.

The instant case in which defendant Pedro Arroyo was convicted of the attempted murder of a police officer and the Sandstrom case where Sandstrom was convicted of deliberate homicide in that he purposely or knowingly caused the death of Annie Jessen, are markedly different.

In Sandstrom defendant's counsel specifically objected to the charge on presumption which was given in the initial instructions by the court, on the ground that "the instruction has the effect of shifting the burden of proof on the issue of purpose or knowledge, to the defense." He was overruled. In Arroyo, the court made no mention of presumption in its initial charge. When a jury question was later submitted, the court consulted both counsel as to the language of the answer, the prosecution proposed what he described as "the standard charge" and defendant's counsel gave his approval by stating he had "no opposition to it." The court thereupon instructed the jury, together with a repetition of the definition of

intent, that "By agreement, I can tell you that people are presumed to intend the natural, probable and logical consequence of their acts."

In Montana, where Sandstrom originated, the law was different from that of New York. The Rules of Evidence of the State of Montana provided that disputable presumptions "may be overcome by a preponderance of the evidence contrary to the presumption. Unless the presumption is overcome, the trier of the fact must find the assumed fact in accordance with the presumption" [Montana Rules of Evidence 301 (b)2.]. The Montana Supreme Court has held that some burden of proof may be allocated to the defendant. In view of the law of Montana and the posture the Sandstrom case assumed there, it was inevitable that the Supreme Court would find an unconstitutional shifting of the burden of proof to the defendant.

The situation in New York is quite different. New York has no such rule of evidence. The Arroyo jury was consistently instructed throughout the court's charge that the People had the entire burden of proof and that it never shifted to the defendant. There the questioned language of the supplementary instruction, when read, as it must be in the context of the entire charge, could not have been interpreted by the jury as shifting to the defendant the burden of proof on the issue of intent.

The questioned charge was, as defendant concedes, correct under New York law. Defendant's counsel emphasizes in his moving papers (Memorandum, p.6) "_ _ _ _counsel should not be faulted for consenting to the requested instruction when it is clear that the 'natural and probable consequences' charge had had long standing

validity in this state. See People v. Agron, 10 N.Y.2d 130, at 139(1961). And, indeed, decisional law continued to approve similar language as recently as People v. Dellipizzi, 61 A.D. 961 (1st Dept. 1978). Consequently, prior to the June 1979 decision in Sandstrom, this charge had never provided the basis for a reversal in New York."

Defendant now argues that even though the trial ended in March 1973 and the New York Appellate Division affirmed in April 1977 the attempted murder conviction and the New York Court of Appeals in May 1977 denied leave to appeal, these events all occurred before the Supreme Court decided Sandstrom on June 18, 1979. Defendant contends that his counsel's failure to object to a practice deemed valid in the state of New York cannot deprive him of the right to attack that practice where an intervening Supreme Court decision calls that practice into question, citing People v. Patterson, (39 N.Y.2d 288 [1976], aff'd. 432 U.S. 197). In Patterson, after defendant's conviction of murder, affirmed by the Appellate Division, and during the pendency of the appeal to the Court of Appeals, the Supreme Court decided the case of Mullaney v. Wilbur (421 U.S. 684, 704). The Supreme Court, in passing on a Maine statute, held that "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." Patterson argued that this decision required the striking down of sections 125.20 and 125.25 of the Penal Law to the extent that they require a defendant charged with murder to bear the burden of proving the

affirmative defense that he acted under the influence of extreme emotional disturbance. On the question of defendant's failure to object to the court's charge, the Court of Appeals stated (p. 295) "Strict adherence to the requirement that complaint be made in time to permit a correction serves a legitimate State purpose (Henry v. Mississippi, 379 U.S. 443, 447). A defendant cannot be permitted to sit idly by while error is committed, thereby allow the error to pass into the record uncured, and yet claim error on appeal. Were the rule otherwise, the State's fundamental interest in enforcing its criminal law could be frustrated by delay and waste of time and resources invited by a defendant. While the review by this court is restricted, on the initial appeal to the Appellate Division, that court, with its broader powers of review, may consider claims of error, notwithstanding a failure to object (CPL 470.15; People v. Robinson, supra)".

"There is one very narrow exception to the requirement of a timely objection. A defendant in a criminal case cannot waive, or even consent to, error that would effect the organization of the court or the mode of proceedings proscribed by law. (Concemi v. People, 18 N.Y. 314, 319.) In Concemi, it was held that a defendant could not consent to being tried by a jury of less than 12 members. In People ex rel. Battista v. Christian (supra), the court ruled that an information charging a defendant with an 'infamous' crime was a nullity, despite defendant's consent, where the State Constitution provided that infamous crimes could be prosecuted only by Grand Jury indictment. Thus the rule has come down to us that where the court had no jurisdiction, or where the

right to trial by jury was disregarded, or where there was a fundamental, non-waivable defect in the mode of procedure, then an Appellate Court must reverse, even though the question was not formally raised below. (People v. Bradner, 107 N.Y.1, 4-5; see People v. Miles, 289 N.Y. 360, 363-364).

This traditionally limited exception has, on occasion, been given broader expression. In People v. McLucas (15 N.Y.2d 167), the defendant did not object to a comment by the trial court as to his failure to testify. Our court ruled that "no exception is necessary to preserve for appellate review a deprivation of a fundamental constitutional right."

The Court of Appeals in Patterson noted that prior to the Supreme Court's decision, there was no doubt that the extreme emotional disturbance affirmative defense was constitutionally valid. It stated (p. 296) "The defendant's failure to object to a practice deemed valid in this State cannot deprive him of the right to attack that practice when an intervening Supreme Court decision calls that practice into question . (See O'Connor v. Ohio, 385 U.S. 92,93; People v. Baker, 23 N.Y.2d 307,317). It is also significant that Mullaney was not handed down until well after the Appellate Division affirmed Patterson's conviction. Were we not to treat appellant's claim on the merits, Patterson would be deprived of a State forum in which his arguments could be heard. (Cf. People v. Robinson, 36 N.Y.2d 224,228 supra)."

As to the second procedural issue to-wit: retroactivity, the Court of Appeals held that the defendant might assert a

Mullaney claim even though his conviction predated that decision. It noted that Mullaney was based on the Supreme Court's earlier holding in In re Winship, (397 U.S. 358), a decision subsequently given retroactive effect. (Ivan v. City of New York, 407 U.S. 203).

Having determined the two procedural issues, New York's highest court turned to the merits. On the merits, it held that the New York law differed significantly from the Maine law struck down by the Supreme Court and stated (p. 297) "We believe that the law of this State does not infringe the due process interests that Mullaney sought to protect."

It should be noted that, despite defendant's failure to object to the 2-line portion of the court's supplemental charge, defendant urged the point in his appeal from his conviction. The Appellate Division affirmed his conviction of attempted murder of a police officer and the Court of Appeals denied leave to appeal.

We have here two procedural threshold issues. The first is whether the defendant, when he not only failed to object to the supplemental language but affirmatively declared that he had no opposition to it, waived his right to a review or preserved a question of law for review. The court in delivering the instruction, stated that it was "by agreement."

The second procedural question is whether Sandstrom should be applied retroactively. In the case at bar the jury was charged by the court in March of 1973. The Sandstrom case was decided by the Supreme Court on June 18, 1979, more than six years later and approximately two years after the New York Appellate Division had affirmed the attempted murder conviction and leave to appeal was denied by the Court of Appeals.

As to the first issue, that of waiver, it has been held that no exception is necessary to preserve for appellate review a deprivation of a fundamental constitutional right. (CPL 470.15; People v. Patterson, supra; People v. Robinson, 36 N.Y. 2d 224; People v. Branch, 54 A.D.2d 90; People v. Lucas, 15 N.Y. 2d 167, 172). While in the instant case, the defendant moves under CPL Section 440.10(h) to vacate his 1973 conviction on the ground of deprivation of a fundamental constitutional right, although enunciated by the Supreme Court six years after his conviction, he may not be barred from the making of such a motion because he failed to make objection and affirmatively declared he had no opposition to the questioned instruction.

Secondly, as to whether the defendant may assert a Sandstrom claim even though his conviction predates that decision, this court holds that he may. Sandstrom cites and is based in part on an earlier holding of the Supreme Court in Matter of Winship, (397 U.S. 358, 363-64) which decision was given retroactive effect. (Ivan v. City of New York, 407 U.S. 203). Accordingly, Sandstrom, like its progenitor Winship should be given retroactive effect. (People v. Gray, 71 A.D.2d 295[Fourth Department, Dec. 14, 1979]; People v. Patterson, supra; Mullaney v. Wilbur, 421 U.S. 684, 688).

In People v. Reyes, ___A.D.2d___(2nd Dept. Sept. 28, 1979), it was held that a similar charge was harmless error.

Now, as to the merits. What are the merits of defendant's claim that the trial court's instruction in the supplemental charge "[p]eople are presumed to intend the natural, probable and logical consequences of their acts" violated his constitutional right to due process of law? Defendant argues that based upon the reasoning of Sandstrom, the jury may have interpreted the instruction as establishing a conclusive presumption or as shifting the burden of persuasion to the defendant. If the prosecution's burden of proof was thereby diminished,

prejudice would exist. However, the totality of the prior charge in the instant case, which at great length, without any mention of presumption, instructed the jury in detail on the subject of intent, must be considered. "[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." (Cupp v. Naughton, 414 U.S. 141, 146-67[1973]). In Cagne v. Meachum (602 F.2d 471, 473[1st Cir. 1979]) where the petitioner sought habeas relief from his state conviction for murder, the jury was instructed, in terms far stronger than in Arroyo: "When the fact of malice is shown there is nothing to rebut the natural presumption of malice for the rational probability is that a man of sound mind intends the probable and natural consequences of his acts." There the 1st Circuit in denying the petitioner's prayer for relief, stressed that the complained of language had to be read in context and that the single remark complained of was not set out as a presumption for the defendant to rebut.

In People v. Albino, (__A.D.2d__ [2nd Dept. March 1980] New York Law Journal, p. 11 c. 2, March 6, 1980) the Appellate Division stated "Defendant's claim that the court's charge to the jury that 'it is a general rule that a person's actions reveal an expression of his mind. A person is presumed to intend the natural consequences of his acts,' violates the rule set forth in Sandstrom v. Montana (__U.S.__ [99 S. Ct. 2450]), is without merit, because a reading of the entire charge discloses that the matter of intent was left for the jury to decide based upon all of the evidence."

In People v. Fournier, 70 A.D.2d 491 [2nd Dept. Nov. 13, 1979] the court held that taking cognizance of Sandstrom, the instruction as to presumption there even though supplemental by a direction that the burden is upon the defendant to come forward, was nevertheless harmless error when read with the charge as a whole.

In People v. Blum, 72 A.D.2d 691 (1st Dept. Nov. 1979) the court, citing Sandstrom on language as to presumption given without objection, stated that there was no likelihood that the jury was misled and saw no error. It stated "In the light of Sandstrom v. Montana (__U.S.__, 616 E.D.2d 39), we deem it advisable to caution the Trial Justices not to use the language of presumption (as distinct from permissible but not necessary inferences) in connection with charges of intent in criminal cases."

The charge of this trial court in Arroyo, on the matter of intent stated in its initial instructions:

p.760 to p. 762 "What is intent; under our law, a person acts intentionally with respect to attempting to cause the death of another person when the alleged perpetrator's conscious objective is to cause such death. This portion of my charge is concerned itself only with the attempt to commit the crime of murder based on the intention to cause of death of a victim, of course, we all recognize that an intention is a subjective matter and it depends on the operation of an individual's mind-none the less it is possible to make a finding of intention based on objective actions of the alleged perpetrator; in fact, this is the only method that we can use in determining intention since we cannot get into the mind of the alleged perpetrator. Therefore, in your deliberation, you may use the defendant's objective action as a determining factor in deciding whether or not he acted intentionally.

You may also refer to all the other evidence which may indicate intent or not indicate intent. The Penal Law of the State of New York defines intentionally as follows: a person acts intentionally with respect to a result or conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct. The Penal Law defines attempt as follows: a person is guilty of an attempt to commit a crime when with intent to commit a crime he engages in conduct which tends to affect the commission of such crime. You must remember that a defendant is charged with the attempt to commit the crime of murder against this police officer Raymond Bernard; therefore, the fact that he did not succeed in bringing about the death of Raymond Bernard is irrelevant, it is sufficient to constitute the crime of attempted murder if the crime could have been committed had the circumstances been as the defendant believed them to be;

> therefore, if you find that at the time and place alleged in the indictment, one, the defendant, Pedro Arroyo had a conscious objective to cause the death of Raymond Bernard and two, that pursuant to that conscious objective, he fired a loaded gun with live ammunition in it at Patrolman Raymond Bernard and three, that Patrolman Raymond Bernard although wounded from defendant's gun was injured but did not die and recovered from that wound, you must return a verdict of guilty of a of attempted murder under the first count of the indictment. However, in order to do so, all the elements must be proved to your satisfaction beyond a reasonable doubt. If any of the elements are not proved to your satisfaction beyond a reasonable doubt, you must return a verdict of not guilty of attempted murder under the first count of the indictment."

The jury subsequently requested that the court "explain to them again the law and the interpretation on the first charge." In response, the court repeated the above charge to the jury.

Thereafter, the jury, in a note, reported: "We have reached agreement on four charges and are divided on the fifth. To assist us with the latter, we would seek further clarification on the words conscious intent."

Out of the presence of the jury, the following colloquy took place.

"MR. BROOMER [ADA]: If Your Honor would take a suggestion from me as to the standard charge — just one line, namely, people are presumed to intend the natural, probable and logical concept (sic) once the act arises.

"THE COURT: Have you any objection to that Mr. Reid?

"MR. REID[Defense Counsel]:I have no opposition to it.

"THE COURT:People are presumed to intend the natural—

"MR. BROOMER: Natural and probable and logical consequences of their acts and you could put that together with the material you already have on intent, Your Honor...."

After the jury returned to the courtroom, the court charged the jury: "Now, members of the jury, a person acts intentionally with respect to attempting to cause the death or injury to another person, when the alleged

perpetrator's conscious objective is to cause such death or injury.

"Intention is a subjective thing and depends on the operation of the individual's mind. Nonetheless, it is possible to make a finding of intention based on the objective actions of the individual.

"The Penal Law defines intentionally with respect to a result or conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct.

"By agreement, I can tell you that people are presumed to intend the natural, probable and logical consequence of their acts."

It is this single sentence, agreed upon by both trial counsel, to which defendant's instant application is addressed.

This court finds, in the totality of the entire charge and the detailed instructions to the jury in this case that they did not have the same potential for impermissible burden shifting as the instruction struck down by the Supreme Court in Sandstrom. They did not deprive the defendant Arroyo of his right to due process of law under the Fourteenth Amendment of the United States Constitution, or violate the requirement that the State prove every element of a criminal offense beyond a reasonable doubt.

Settle order.

Dated:May 19. 1980

S/ HILDA SC

J.S.C.

1. People v. Stokes, 53 N.Y.2d 164, 179[1973]; People v. Aaron, 10 N.Y.2d 130 [1961]; People v. Thomas, 67 N.Y. 218, 225 [1876]; Richardson, Evidence, Sec. 90, at 64 [10th ed. 1973].

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